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In the Supreme Court of the United States

OCTOBER TERM, 1979

MAJOR LEO D. DOYLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 2

Statement 2

Argument 7

Conclusion 13

CITATIONS

Cases:

Dilley v. *Alexander*, 603 F. 2d 914 ..... 7, 8, 9

Grover v. *United States*, 200 Ct. Cl. 337 11

Haynes v. *United States*, 418 F. 2d 1380 11

Jones v. *Alexander*, 609 F. 2d 778 7

Mathews v. *Eldridge*, 424 U.S. 319 10

Mount Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 4

Pine v. *United States*, 371 F. 2d 466 11

Unemployment Compensation Commission v. *Aragon*, 329 U.S. 143 9

United States v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33 9

Weinberger v. *Salfi*, 422 U.S. 749 10

Page

Statutes:

Social Security Act, 42 U.S.C. 405 10

10 U.S.C. 266 ..... 2, 3

10 U.S.C. 1163(d) 7

10 U.S.C. 3911 7

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 46a-87a) is reported at 599 F. 2d 984. The order of September 28, 1979, amending the opinion (Pet. App. 88a-90a), is not reported. The order of November 30, 1979, further amending the opinion (Pet. App. 91a-93a), is reported at 609 F. 2d 990.

JURISDICTION

The judgment of the Court of Claims was entered on May 16, 1979. In response to a motion for rehearing and clarification, the opinion was amended on September 28, 1979 (Pet. App. 88a-90a). The opinion was again modified upon motion for clarification on November 30, 1979 (Pet. App. 91a-93a). On December 21, 1979, the Chief Justice

extended the time for filing a petition for a writ of certiorari to and including February 25, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the Court of Claims correctly ruled that petitioners could not raise an objection that they had not raised administratively to the procedure established by the Army Board for Correction of Military Records (ABCMR) for reconstructing the deliberations of certain promotion selection boards.

2. Whether the procedures used by these promotion boards violated the Army's own regulations.

STATEMENT

1. Army officers serving on active duty, both Regular and Reserve, may obtain promotions to temporary rank in the Army of the United States. Periodically, officers are considered for such promotions by Army selection boards based upon their service record. Congress has provided that these selection boards, when considering the promotion of Reserve officers, must include in their membership an appropriate number of Reserves. 10 U.S.C. 266. Officers eligible to be selected for temporary promotion are separated into two "zones of consideration," a primary zone for more senior officers and a secondary zone for more junior officers. Selection boards are limited as to the total number of officers they may select for promotion and are further limited as to the number of officers who may be selected from the secondary zone. Army regulations provide that a primary zone Reserve officer who is twice passed over for a

temporary promotion will be released from active duty. Secondary zone officers who are not selected for promotion, however, are not considered "passed over" for purposes of release from active duty (Pet. App. 48a-50a).

Petitioners are Army Reserve officers who were involuntarily released from active duty in 1975 as a result of being passed over for promotion in temporary grade by two successive promotion selection boards in 1974 and 1975 (Pet. App. 47a). Fifteen percent of the selections in those years were secondary zone officers, the maximum percentage allowable; the remaining 85% were primary zone officers. The boards, however, failed to contain Reserve officer membership as required by 10 U.S.C. 266 (Pet. App. 52a). Claiming that this defect invalidated the determinations of the boards, petitioners, as well as other Reserve officers who were passed over by these boards, filed applications for relief with the Army Board for Correction of Military Records (ABCMR) to set aside their passovers and to obtain reinstatement to active duty.

In response to these applications, the Secretary of the Army in 1976 convened selection boards containing Reserve officer membership in an effort to reconstruct the deliberations of the original 1974 and 1975 boards. These reconstituted boards ("Relook Boards") reviewed the officers' records as they appeared at the time they were reviewed by the original boards and followed the same instructions and selection criteria provided to the original boards (Pet. App. 66a-67a). Because those officers objecting to the determinations of the original boards were all primary zone officers, the Relook Boards reconsidered only primary zone officers, and the boards were authorized to select officers to fill only the 85% of the promotion slots that had originally been filled by primary zone officers.

The Relook Boards selected some officers who had been passed over by the original boards, but other officers, including petitioners, were again passed over. Those officers selected by the Relook Boards were reinstated to active duty and treated as if they had been selected by the original boards. The Army Correction Board ruled that the Relook procedure demonstrated that those officers (including petitioners) who were again passed over had not been prejudiced by the defect in the composition of the original boards. As a result, the ABCMR concluded that petitioners were not entitled to relief; *i.e.*, their releases from active duty, which were based upon their nonselections by the original 1974 and 1975 boards, should be affirmed. In November 1976, the Assistant Secretary of the Army for Manpower and Reserve Affairs approved the findings and recommendations of the Correction Board (Pet. App. 52a-54a).

2. Petitioners then brought this action in the Court of Claims, contending that the absence of Reserve officers on the original 1974 and 1975 selection boards rendered the results of those boards a nullity and accordingly that they were entitled to relief, including back pay and reinstatement (Pet. App. 48a). Petitioners also contended that the Relook Board procedure was an inadequate recreation of the deliberations of the original boards because it considered only primary zone officers and only 85% of the available slots. Petitioners contended that this difference materially affected their prospects of selection by the Relook Boards.

The government did not dispute that the original boards were improperly constituted, but, relying on *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), contended that the

procedural defect in the promotion process did not entitle petitioners to reinstatement and back pay unless petitioners would have been selected for promotion in the absence of the defect. The failure of the Relook Boards to select petitioners, the government contended, demonstrated that petitioners would not have been selected even if the original boards had been properly constituted; hence, the error was harmless as to them.

The Court of Claims rejected the government's harmless error argument. Finding that the statutory violation was important and that the prejudicial effect of the absence of Reserve officers on the deliberations of the original boards could not be determined after the fact, the court rejected the contention that the Relook Boards' findings demonstrated the harmlessness of the error as to petitioners (Pet. App. 61a-63a). Thus, the Court concluded that "[petitioners'] separations, predicated on two passovers by illegally constituted boards, were invalid. These [petitioners] were entitled to their position, rank, and pay until they were terminated from active duty under proper authority" (*id.* at 65a). Chief Judge Friedman dissented on this point, agreeing with the government that the Relook Boards' nonselection of petitioners demonstrated that the error in the original boards' composition was harmless (*id.* at 79a-87a).

The Court of Claims, however, held that the Secretary of the Army had the authority to set up new selection boards to remedy the legal error in the constitution of the original boards (Pet. App. 66a). Because the Relook Boards, in effect, redid the defective promotion process in accordance with all applicable statutes and regulations (*id.* at 66a-67a), the court concluded that "these [petitioners] did receive full and fair consideration by the reconstituted selection boards. When this was done to

remedy the error, the affected officers had everything to which they were thereafter legally entitled, including promotion if so recommended" (*id.* at 72a).

In reaching this conclusion, the court rejected petitioners' contention that the Relook procedure was inadequate because it was limited to primary zone officers. Although there was evidence that the Secretary in 1974 and 1975 had strongly implied that the maximum number of secondary zone officers should be selected and that, in any case, it was "highly unlikely that the reconstituted boards would have selected less than the maximum number of secondary zone officers," (*id.* at 68a-69a), the court did not rely on this evidence. Rather, the court held that because petitioners had been notified by the decision of the Army Correction Board that only primary zone officers would be reconsidered by the Relook Boards and had not objected, they could not challenge that feature of the Relook procedure for the first time in court (Pet. App. 70a-72a).

Thus, the court's order granted petitioners constructive service and back pay for the period dating from their illegal separation from active duty until the date of their proper release following the determinations by the Relook Boards. The court's opinion was twice modified on rehearing to specify the proper release date (Pet. App. 88a-90a, 91a-93a). Petitioners seek further review here because they are dissatisfied with the scope of that remedy, claiming that they are entitled to reinstatement, beyond the release date based on the Relook Boards' selections, until they are passed over by two regularly constituted promotion boards.[1]

ARGUMENT

Petitioners contend (Pet. 20-31) that the Court of Claims erred in ruling that they could properly be released from active duty based on the determinations of the Relook Boards and that the court's decision conflicts with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Dilley* v. *Alexander*, 603 F. 2d 914 (1979). These contentions are without merit.

1. The Court of Claims correctly concluded that petitioners could be released from active duty based on nonselection by the Relook Boards if those boards fairly recreated the deliberations of the original boards, and we rely on the court's opinion (Pet. App. 65a-67a). Accord, *Jones* v. *Alexander*, 609 F. 2d 778 (5th Cir. 1980). *Dilley* v. *Alexander*, *supra*, did not disagree with this proposition; it granted a different remedy because of the different facts involved in that case.

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[1]This case was consolidated in the Court of Claims with *Adams* v. *United States*. The *Adams* plaintiffs have not petitioned for certiorari because the constructive service awarded under the decision of the Court of Claims gave them in excess of 18 years of active service. Under 10 U.S.C. 1163(d) and 3911, they are thus eligible for Army retirement benefits for the rest of their lives (see Pet. 14 n.12, 21 n.19). Petitioners, however, are more junior officers than the *Adams* plaintiffs, and the constructive service awarded to them is not sufficient to make them eligible for retirement benefits.

The plaintiffs in *Dilley* were Reserve officers who had been released from active duty after being passed over for promotion by the 1975 and 1976 promotion boards. The 1976 promotion board contained Reserve officer membership, so its deliberations were never reconstructed by a "Relook" procedure. The court of appeals acknowledged that if the Army's remedial steps "had successfully placed the appellants in the same position as they were in before the 1975 Boards convened, then the procedural defect would have been repaired and appellants would have no cause to complain." 603 F. 2d at 924. The court of appeals found, however, that the remedial steps did not achieve this result for two reasons. *Id.* at 924-925. First, the court of appeals ruled that the plaintiffs were prejudiced in their consideration by the 1976 boards because those boards had considered records that reflected the improper nonselection by the original 1975 boards. This problem is absent in this case, where both the 1974 and 1975 selection process was completely redone. Second, the court of appeals noted that the failure to consider secondary zone officers was a defect in the Relook procedure that affected the plaintiffs' rights. The Court of Claims did not decide this question because it held that petitioners had waived this objection by not making it at the administrative level. Accordingly, *Dilley* does not conflict with the decision of the Court of Claims.[2]

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[2]The one difference between the two decisions is that the Court of Claims ruled that petitioners had waived their objection to the restriction of "Relook" to primary zone officers, although the government did not specifically raise this point, while the court of appeals refused to consider the waiver contention because it was not raised until rehearing. 603 F. 2d at 926. That difference in the exercise of discretion by these courts is not one that requires resolution by this Court.

Indeed, both courts specifically noted that they perceived no conflict between the two decisions. The *Dilley* court expressly stated that a conflict with this case "does not exist." 603 F. 2d at 925, 926. And the Court of Claims stated (Pet. App. 63a-64a) that it "agree[d] with the *approach* taken by the court of appeals in *Dilley*." It explained the "slightly different" result by reference to the two points outlined above (*id.* at 72a n.15).

2. Moreover, the Court of Claims did not err in concluding that petitioners' objection to the method used by the Relook Boards could not be raised on judicial review. This Court has long recognized that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has the opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). The basis for this policy is that "[s]imply fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *Ibid.* See also *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 155 (1946).

The Court of Claims determined that petitioners were on notice of the manner in which the Relook Boards were to reconsider only primary zone officers but that they chose not to raise any objection until after they found out that they were not recommended for promotion (Pet. App. 70a). This enabled them to wait for the decisions of the Relook Boards and reap the benefits if the determination was favorable, yet to preserve a ground for

objection on judicial review if it was not. Specifically, the court concluded that petitioners were "well satisfied" with the Relook remedy at the time the boards were convened (*ibid.*). Under the circumstances, the court properly concluded that petitioners had waived their objection to the manner in which the proceedings of the Relook Boards were conducted. As the court stated (Pet. App. 72): "Plaintiffs cannot have their cake and eat it too. Any other rule would not give proper regard to the broad powers of the agency to correct errors, would be wasteful of the good faith effort and expense undertaken by the Secretary in this case, and would not accord with principles of justice."

Contrary to petitioners' contention (Pet. 23-24), this decision is in accord with the decisions of this Court in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), and *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Both *Salfi* and *Eldridge* specifically addressed the issue of exhaustion of remedies as a jurisdictional prerequisite to suit under the Social Security Act, 42 U.S.C. 405. In *Salfi*, the Court concluded that further administrative review is unnecessary when the only issue is the constitutionality of the statute. 422 U.S. at 765. The Court also found that the Secretary of HEW has the power under 42 U.S.C. 405(a) to determine when an administrative decision is final. 422 U.S. at 766. In *Eldridge*, the Court held that there may be cases where a claimant's interest, because of the irreparable harm that he may suffer, is such that the agency's determination of what constitutes a "final" decision is not binding on the courts. 424 U.S. at 330-331.

None of these issues is even remotely presented in this case. Petitioners assert (Pet. 23) that "the Secretary had agreed that plaintiffs had exhausted their administrative remedy." The government did agree that petitioners had exhausted their administrative remedies in that the Correction Board's decision, after the reconsideration by

the Relook Boards had been completed, was a final action that was ripe for review by the Court of Claims. However, the government has never agreed that an objection to the Relook procedure, made *before* the procedure was carried out, would have been futile, as petitioners assert (Pet. 24). There is no basis for this speculative assertion. Indeed, because the Relook procedure was obviously intended to recreate the original deliberations of the promotion boards, it seems likely that the Correction Board would have carefully heeded any objection that the Relook procedure was an inadequate recreation. The Court of Claims simply applied the rule that it need not consider objections to the decision of an administrative tribunal that were not raised administratively, where, as here, the administrative tribunal had the power to alleviate the objections had they been raised before it. See *Grover* v. *United States*, 200 Ct. Cl. 337 (1973); *Haynes* v. *United States*, 418 F. 2d 1380 (Ct. Cl. 1969); *Pine* v. *United States*, 371 F. 2d 466 (Ct. Cl. 1967). The court's ruling that equitable considerations require application of that rule in this case presents no question warranting this Court's review.

Petitioners also maintain (Pet. 26-29) that, contrary to the finding of the Court of Claims, they had no notice as to the manner in which the Relook Boards were to operate. The record reflects, however, that both the recommendation of the ABCMR to convene Relook Boards and the Secretary's resultant directive that such boards be convened plainly indicate that the Relook Boards were to consider only primary zone officers (Pet. App. 39a-42a). Petitioners do not deny that they had actual notice of these two documents. Accordingly, the factual finding of the Court of Claims is amply supported by the record.

In any event, the failure of the Relook Boards to consider secondary zone officers did not prejudice petitioners. As a practical matter, it is exceedingly likely that the Relook Boards would have selected the 15% maximum of secondary zone officers for promotion, as did the original boards (see Pet. App. 68a-69a, 86a-87a). This would have left petitioners in no worse position than they were in under the Relook procedure—competing with all other primary zone officers for 85% of the promotions. Indeed, petitioners' overall chances for promotion were enhanced by the Relook procedure. Because officers selected by the original boards *and* officers selected by the Relook Boards were both promoted, the total number of primary zone officers promoted was higher than the number that would have been promoted had the original boards been properly constituted.

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3. Petitioners also contend (Pet. 32-35) that the procedures used by the promotion boards violated the Army's own regulations. This contention is insubstantial.

Specifically, petitioners contend that the promotion boards were required twice to find an officer "not fully qualified" before he could be released from active duty. In addition, petitioners contend that the number of officers selected from the secondary zone exceeded the number permitted by Army regulations. As the Court of Claims found, however, in 1968 and 1970 the Army had adopted and widely disseminated so-called message amendments that changed the label given by the promotion boards to certain officers from "not fully qualified" to "not selected" (Pet. App. 73a-74a). Thus, even though the text of AR 624-100 was not technically reprinted as amended, it is

clear that the effective Army regulations were not violated by the failure specifically to find petitioners "not fully qualified." Similarly, the Secretary increased by message amendment in 1972 the percentage of secondary zone officers that could be selected, and the selections by the 1974 and 1975 promotion boards and Relook Boards complied with this limit (Pet. App. 76a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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